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In The

Supreme Court of the United States

October Term, 1980

THE NORTH HAVEN BOARD OF EDUCATION,
Petitioner

vs.

SHIRLEY M. HUFSTEDLER, et al.,
Respondents

and

THE TRUMBULL BOARD OF EDUCATION,
Petitioner

vs.

UNITED STATES DEPARTMENT OF EDUCATION

and

LINDA POTZ,
Respondents

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

STATUTES AND REGULATIONS

1. Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a).

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
>
> Classes of educational institutions subject to prohibition
>
> (1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;
>
> Educational institutions commencing planned change in admissions
>
> (2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972,

nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

Educational institutions of religious organizations with contrary religious tenets

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

Educational institutions training individuals for military services or merchant marine

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

Public educational institutions with traditional and continuing admissions policy

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

Social fraternities or sororities; voluntary youth service organizations

(6) this section shall not apply to membership practices --

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students

in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

Boy or Girl conferences

(7) this section shall not apply to

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for --

(i) the promotion of any Boys State conference, Boys Nation conference, Girls

State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

Father-son or mother-daughter activities at educational institutions

(8) this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

Institution of higher education scholarship awards in "beauty" pageants

(9) this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual

and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

2. Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1682, provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance

under such program or activity to any recipient as to whom there has been an express finding on the record, after an opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the cir-

cumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

3. The regulations of the Department of Education, 34 C.F.R. §§ 86.51-86.61.*

Subpart E--Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

34 C.F.R. § 106.51 Employment.

(a) General. (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefore, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

*These regulations, at the time of the District Court's decisions, appeared at 45 C.F.R. §§ 86.51-86.61 inclusive. They were recodified on May 9, 1980, in connection with the establishment of the Department of Education, 45 Fed. Reg. 30802, 30962, 30963 (1980).

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex. if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) Application. The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

§ 106.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless;

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

§ 106.53 Recruitment.

(a) Nondiscriminatory recruitment and hiring. A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) Recruitment patterns. A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

§ 106.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

§ 106.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression,

seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 106.61.

§ 106.56 Fringe benefits.

(a) "Fringe benefits" defined. For purposes of this part, "fringe benefits" means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 106.54.

(b) Prohibitions. A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

§ 106.57 Marital or parental status.

(a) General. A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of a household or principal wage earner in such employee's or applicant's family unit.

(b) Pregnancy. A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) Pregnancy as a temporary disability. A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) Pregnancy leave. In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a

recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

§ 106.58 Effect of State or local law or other requirements.

(a) Prohibitory requirements. The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) Benefits. A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the

same compensation, service, or benefit to members of the other sex.

§ 106.59 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a bona-fide occupational qualification for the particular job in question.

§ 106.60 Pre-employment inquiries.

(a) Marital status. A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

(b) Sex. A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

§ 106.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1022-24—September Term, 1979

(Argued April 24, 1980 Decided July 24, 1980)

Docket Nos. 79-6136, -6247, -7747

NORTH HAVEN BOARD OF EDUCATION,

Plaintiff-Appellee,

v.

SHIRLEY M. HUFSTEDLER, *et al.,*

Defendants-Appellants.

TRUMBULL BOARD OF EDUCATION,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF EDUCATION and LINDA POTZ,

Defendants-Appellants.

Before:

KAUFMAN and OAKES, *Circuit Judges*, and TENNEY, *District Judge.**

Appeal from orders of summary judgment in the United States District Court for the District of Connecticut, Ellen Bree Burns, *Judge*, declaring regulations governing sex discrimination in employment issued by the Department of Health, Education and Welfare (now adopted by the Department of Education) invalid and enjoining the Department from withholding or threatening to withhold any federal funds under those regulations.

The Court of Appeals held that the employment discrimination regulations contained in 45 C.F.R. Part 86, Subpart E (now in 34 C.F.R. Part 106, Subpart E (May 9, 1980)) were authorized under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and hence were valid and enforceable.

Judgments reversed and cases remanded.

MARIE E. KLIMESZ, United States Department of Justice, Washington, D.C. (Drew S. Days III, Assistant Attorney General, Washington, D.C., Richard Blumenthal, United States Attorney for the District of Connecticut, and Brian

* Of the Southern District of New York, sitting by designation.

K. Landsberg, United States Department of Justice, Washington, D.C., of counsel), *for Appellants Shirley M. Hufstedler et al. and United States Department of Education.*

BEVERLY J. HODGSON, Bridgeport, Conn. (Koskoff, Koskoff & Bieder, Bridgeport, Conn., of counsel), *for Appellant Linda Potz.*

SUSAN K. KRELL, Hartford, Conn. (Siegal, O'Connor & Kainen, Hartford, Conn., of counsel), *for Appellee North Haven Board of Education.*

PAUL E. KNAG, Bridgeport, Conn. (Cummings & Lockwood, Richard W. Rutherford, Bridgeport, Conn., of counsel), *for Appellee Trumbull Board of Education.*

OAKES, *Circuit Judge:*

Cognizant that four other courts of appeals and a number of district courts have held otherwise, we nevertheless are convinced after extreme care and consideration that regulations issued by the United States Department of Health, Education and Welfare (HEW)[1] concerning sex discrimination in educational

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1 At the time these suits were brought and appealed, the regulations in questions were printed at 45 C.F.R. Part 86, Subpart E, under the auspices of HEW. Since the jurisdiction over educational matters was transferred to the new Department of Education on May 4, 1980, these regulations have been reissued in identical form by that department at 34 C.F.R. Part 106, Subpart E, 45 Fed. Reg. 30802

employment are valid under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, as properly construed. Accordingly, we reverse the decisions of the United States District Court for the District of Connecticut, Ellen Bree Burns, Judge, which declared those regulations invalid and which enjoined HEW from withholding educational funding from two Connecticut school districts, North Haven and Trumbull, respectively.

FACTS

Two separate cases are here involved and they will be treated separately for factual purposes even though they both involve the same essential legal question.

I. *North Haven*—North Haven receives federal financial aid for its educational programs and activities, and hence is governed by the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, barring discrimination on the basis of sex. Since the 1975-76 school year, North Haven has used between 46.8% and 66.9% of its federal financial assistance to pay salaries of its employees and is expected to continue doing so.

On January 10, 1978, in response to a private complaint alleging that the North Haven Board of Education was violating Title IX by refusing to rehire a tenured teacher who had taken a one-year maternity leave, HEW requested North Haven to provide specific information concerning its policies on hiring, leaves of

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(May 9, 1980). To be consistent with the briefs of the parties and the district court decision, however, we will continue to refer throughout this opinion to the regulations promulgated by HEW and to HEW's authority under Title IX.

absence, seniority, and tenure. North Haven did not do so, asserting that HEW lacked authority to regulate employment practices under Title IX. When HEW notified the school district that the matter had been referred to its appropriate office for possible administrative enforcement proceedings, North Haven brought this action seeking declaratory and injunctive relief. The complaint alleged that the promulgation by HEW of the regulations contained in 45 C.F.R. Part 86, Subpart E, "was in excess of the statutory authority conferred by Congress in Section 902" of Title IX, 20 U.S.C. § 1682. After HEW moved in the alternative for dismissal or summary judgment and North Haven filed a cross-motion for summary judgment, the district court granted North Haven's motion for summary judgment on April 26, 1979.

II. *Trumbull*—Appellant Linda Potz, a former guidance counselor in the Trumbull public schools, filed an administrative complaint with HEW alleging that the Trumbull Board of Education had discriminated against her on the basis of sex by giving her inferior job assignments, by providing her with inferior working conditions, and by not renewing her contract. The Trumbull board acknowledged receiving "substantial" federal financial assistance, although it is unclear how much, if any, of that assistance was used for guidance counseling. HEW determined that Trumbull had indeed violated Title IX by requiring Potz to perform typing and to run errands not required of male counselors, by moving her office to a smaller, poorly heated, and less comfortable space in the gymnasium away from the other counselors, by asking her to change a report showing that she had seen many more students in a given week than the number seen by her male

counterparts, and by not renewing her contract on the basis of her sex. On September 20, 1978, HEW notified the board that the school district was in violation of Title IX and ordered Trumbull to take corrective action including the reinstatement of Potz. Trumbull did not take such corrective action and instead filed this action for declaratory and injunctive relief against both HEW and Potz challenging HEW's authority to issue Subpart E, as in the North Haven case. The district court granted Trumbull's motion for summary judgment on May 24, 1979, based on its prior decision in North Haven, and on September 13, 1979, denied Potz's timely-filed motion to set aside the prior order of summary judgment and denied her motion for summary judgment.

THE DECISION BELOW

In each case, the district court declared Subpart E invalid and enjoined the federal defendants from interfering with federal financial assistance to plaintiffs for any alleged noncompliance with Subpart E. In holding that the prohibitions of Title IX do not apply to employment practices of educational institutions, the district court reached the same conclusion reached by a number of other courts.[2]

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2 *Seattle University v. HEW*, No. 78-1746 (9th Cir. June 19, 1980) (per curiam) (affirming 16b FEP Cases 719 (W.D. Wash. 1978)); *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir.), *cert. denied*, 100 S. Ct. 467 (1979) (affirming 438 F. Supp. 1021 (E.D. Mich. 1977)); *Junior College District of St. Louis v. Califano*, 597 F.2d 119 (8th Cir.), *cert. denied*, 100 S. Ct. 467 (1979) (affirming 455 F. Supp. 1212 (E.D. Mo. 1978)); *Islesboro School Committee v. Califano*, 593 F.2d 424 (1st Cir.), *cert. denied*, 100 S. Ct. 467 (1979) (affirming *Brunswick School Board v. Califano*, 449 F. Supp. 866 (D. Me. 1978)); *Grove City College v. Harris*, No. 78-1293 (W.D. Pa. March 10, 1980); *Auburn School District v. HEW*, No. 78-154

Section 901(a) of Title IX, 20 U.S.C. § 1681(a), provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

In first granting summary judgment to North Haven, the district court relied principally on the reasoning of another district court in *Romeo Community Schools v. HEW*, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 100 S. Ct. 467 (1979). The district court held that § 901(a) "does not cover the employment practices of educational institutions," but rather only prohibits "sex discrimination against students and other direct beneficiaries of federal educational assistance funds." Aware that Title IX was patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, but without a provision similar to § 604 of Title VI excluding employment from the coverage of the statute,[3] the district court

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(D.N.H. March 29, 1979), *appeal dismissed*, No. 79-1261 (1st Cir. 1980); *Board of Education of Bowling Green City District v. HEW*, No. C78-177, 19 FEP Cases 457 (N.D. Ohio March 14, 1979); *University of Toledo v. HEW*, 464 F. Supp. 693 (N.D. Ohio 1979); *Dougherty County School System v. Califano*, No. 78-30-ALB, 19 FEP Cases 688 (M.D. Ga. August 22, 1978), *appeal docketed*, No. 78-3384 (5th Cir. Nov. 1, 1978).

3 Section 604 of Title VI, 42 U.S.C. § 2000d-3 provides:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

concluded that such a provision was omitted from Title IX because it would have been inconsistent with other portions of the Title IX legislative package pertaining to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and to the Equal Pay Act, 29 U.S.C. § 206(d), rather than because Congress intended that employment be covered under § 901. The court also noted that § 901(a) on its face "addressed itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs," and that the express exclusions from coverage of § 901(a)[4] "relate solely to student activity or enrollment."

The court further relied on the fact that "[t]ermination of federal funds is the only sanction authorized" under Title IX and wondered whether Congress would have authorized termination of funds for a school program, thereby penalizing the students, where more effective and less costly alternative methods of prohibiting employment discrimination were readily available. *See* Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 Geo. L.J. 49, 61-62 (1976). Moreover, under § 902 of the Act, 20 U.S.C. § 1682, the district court noted that any termination of funds is "limited in its effect to the particular program, or part thereof, in which . . . noncompliance has been . . . found,"[5] and that

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4 Section 901(a) contains nine express exclusions from coverage under the basic prohibition, none of which specifically mentions employment.

5 Section 902 of Title IX, 20 U.S.C. § 1682, provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract

regulation of employment practices is inherently "non-program specific." In ruling against appellants, the court also noted that because Subpart E prohibits discriminatory employment practices "for their own sake" these regulations cannot be upheld on the so-called "infection theory" utilized in other cases—*i.e.*, that employment discrimination has an adverse effect upon the students themselves.[6]

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of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

6 *See Caulfield v. Board of Education of the City of New York*, 583 F.2d 605, 610-11 (2d Cir. 1978); *United States v. Jefferson County Board of Education*, 372 F.2d 836, 882-86 (5th Cir. 1966), *adopted en banc per curiam*, 380 F.2d 385 (5th Cir.) *cert. denied*, 389 U.S. 840 (1967).

Later, in a separate opinion ruling in favor of Trumbull, the district court concluded that the Supreme Court's decision in *Cannon v. University of Chicago,* 441 U.S. 677 (1979) (Title IX permits private right of action), did not affect its ruling, and adopted the reasoning of the court of appeals in *Romeo Community Schools v. HEW,* 600 F.2d 581 (6th Cir.), *cert. denied,* 100 S. Ct. 467 (1979), rejecting HEW's interpretation of the legislative history of Title IX. In the district court's view, the legislative history suggested "that Title IX's focus was upon students and other direct beneficiaries."

DISCUSSION

As in any other problem of statutory interpretation we must examine the words of the statute, the legislative history, and the statutory purpose to be served. We may also be aided by examining analogous statutes or statutes *in pari materia* as well as by applicable canons of construction, one of which in the immediate context is to give due weight to the contemporaneous construction of a statute by the agency charged with its administration. *See NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 274-275 (1974); *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-34 (1971). In determining what weight is due, however, as Judge Learned Hand once put it:

> it is doubtful whether in the end one can say more than that there comes a point at which the courts must form their own conclusions. Before doing so they will, of course,—like the administrative tribunals themselves—look for light from every quarter, and after all crannies have been searched,

> will yield to the administrative interpretation in all doubtful cases; but they can never abdicate.

Niagara Falls Power Co. v. FPC, 137 F.2d 787, 792 (2d Cir.), *cert. denied*, 320 U.S. 792 (1943).

HEW argues that the language of § 901(a) clearly encompasses employment discrimination. The argument is that the general category of "person[s]" protected by § 901(a), 20 U.S.C. § 1681(a), is not limited to any particular class of persons and is subject only to the nine express exclusions set out thereafter. Obviously the persons include students and, HEW argues, equally clearly include employees of a university, college or school district who are in a position to "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" federally funded education programs or activities. However, this language is more ambiguous than HEW suggests. The First Circuit, for example, thought in *Islesboro School Committee v. Califano*, 593 F.2d 424, 426 (1st Cir.), *cert. denied*, 100 S. Ct. 467 (1979), that this language, "on its face, is aimed at the beneficiaries of the federal monies, *i.e.*, either students attending institutions receiving federal funds or teachers engaged in special research being funded by the United States government." Indeed, it was due to the ambiguity of the virtually identical language in § 601 of Title VI, 42 U.S.C. § 2000d, and the confusion generated by it, that Congress found it necessary later to enact § 604 of Title VI, 42 U.S.C. § 2000d-3, barring application of Title VI to employment. *See* Kuhn, *supra*, 65 Geo. L.J. at 53-54. We hence must look beyond the language of the statute itself to determine its meaning.

HEW argues that its interpretation of § 901(a) is supported by the fact that none of the nine specific exemptions from the coverage of the statute contained in § 901(a)(1)-(9), 20 U.S.C. § 1681(a)(1)-(9), removes employment from the basic prohibition. We note that Paragraphs (a)(3) and (4) exclude religious and military institutions from the application of the statute and that the remaining exclusions exempt certain practices of otherwise covered institutions. It is true as HEW contends that none of these exemptions addresses the question of employment discrimination or in any way suggests that employment practices are excluded from the basic prohibition of the statute. But, as the Sixth Circuit has said, this argument "cuts both ways." *Romeo Community Schools, supra,* 600 F.2d at 584. While we cannot agree with HEW that the failure of the exclusions to mention employment is clear support for its position, we also cannot agree with the Sixth Circuit that because the exceptions relate to students "[i]t may be fairly assumed" that only students are the subject of § 901. *Id.* Indeed, Paragraphs (a)(3) and (4) do not mention students at all, but rather exempt entire categories of institutions. The Sixth Circuit's "assumption" is precisely that, and whether it is "fair" or not depends on the legislative history and purpose of Title IX.

HEW is on somewhat firmer footing when it argues that although Title IX is modeled after Title VI of the Civil Rights Act of 1964, *see Cannon v. University of Chicago, supra,* 441 U.S. at 694-96, Title IX conspicuously omits Title VI's exclusion of employment practices contained in 42 U.S.C. § 2000d-3,[7] even

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7 *See* note 3 *supra.*

though the House proposed to include an equivalent provision in Title IX.[8] But the First and Sixth Circuits, as well as the court below, have taken the position that the House proposal was not ultimately included in Title IX because it would have been inconsistent with the sections of Title IX pertaining to employment discrimination under Title VII of the 1964 Civil Rights Act and the Equal Pay Act. *Islesboro School Committee, supra,* 593 F.2d at 428; *Romeo Community Schools, supra,* 600 F.2d at 584. *See also* Kuhn, *supra,* 65 Geo. L. J. at 57 ("The inclusion of section 904 in the bill was nothing more than a drafting mistake.") Again, we are pointed to a careful examination of the legislative history and purpose of the statute to determine whether HEW's conclusion or that of these other courts is the correct one.

In our view the legislative history, closely examined, supports HEW rather than the various court decisions which we have mentioned above. The Supreme Court has informed us of the overall objectives Congress sought in enacting Title IX:

> First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.

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8 *See* H.R. Rep. No. 554, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2462, 2566. The Conference Committee Report contains the following:

> (f) In addition, the House amendment, but not the Senate amendment, provided that nothing in the title authorizes action by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. The House recedes.

Id. at 2671-72.

Cannon, supra, 441 U.S. at 704. We turn then to the actions of each House and of the conference committee to make the determination whether interpreting Title IX to cover employment discrimination is consistent with these congressional objectives.

When we look at the Senate we note that on August 5, 1971, Senator Bayh introduced an amendment to a pending higher education bill, S. 659, for the purpose of prohibiting sex discrimination by certain educational institutions. In introducing his amendment he stated:

> While over 50 percent of our population is female, there is no effective protection for them as they seek admission *and employment* in educational facilities. The antidiscrimination provisions of the Civil Rights Act of 1964 do not deal with sex discrimination by our institutions of higher learning.
>
> * * * * *
>
> Today, women seeking *employment* in higher education face an array of obstacles almost as insuperable as those which used to face blacks.

117 Cong. Rec. 30155-56 (1971) (emphasis added). The next day, Senator McGovern stated his support for Senator Bayh's amendment, and in doing so referred to statistics that only nine percent of America's college professors were women, only six percent of law school students were women, and only eight percent of medical school students were women. 117 Cong. Rec. 30411 (1971). Senator Bayh's 1971 amendment did not come to a vote, since it was ruled "nongermane." *See* 118 Cong. Rec. 5808 (1972). Senator Bayh's remarks quoted above indicate at least an initial intention on his

part to prohibit employment discrimination under the provision of his 1971 amendment which subsequently formed the basis of § 901.

Senator Bayh introduced a new version of his amendment on February 28, 1972, as Amendment No. 874 to S. 659, which was still under consideration by Congress. 118 Cong. Rec. 5802-03 (1972). In addition to the provisions of the 1971 proposal, Senator Bayh included provisions amending Title VII of the Civil Rights Act of 1964 and amending § 13(a) of the Fair Labor Standards Act, 29 U.S.C. § 213(a), to exempt from the scope of that subsection the Equal Pay Act, 29 U.S.C. § 206(d).[9] The amendment was passed by the Senate the same day it was introduced. 118 Cong. Rec. 5815 (1972).

In introducing his amendment, Senator Bayh stated that "sex discrimination reaches into all facets of education—admissions, scholarship programs, *faculty hiring and promotion, professional staffing,* and pay scales." 118 Cong. Rec. 5803 (1972) (emphasis added). The Senator went on to say:

> Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs *and employment resulting from those programs* . . . . More specifically, *the heart of this amendment* is a provision banning sex discrimination in educational pro-

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9 That portion of Senator Bayh's amendment dealing with Title VII, contained in § 1005 of the amendment, was not ultimately enacted as part of Title IX because a similar provision had already been enacted as §§ 2 and 3 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e(a) and 2000e-1. The portion of the amendment dealing with the Equal Pay Act, contained in § 1009 of the amendment, was enacted as § 906(b)(1) of Title IX and is now part of 29 U.S.C. § 213(a).

> grams receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and *faculty employment, with limited exceptions.* Enforcement powers include fund termination provisions—and appropriate safeguards—parallel to those found in title VI of the 1964 Civil Rights Act. *Other important provisions* in the amendment would extend the equal employment opportunities provisions of title VII of the 1964 Civil Rights Act to educational institutions, and extend the Equal Pay for Equal Work Act to include executive, administrative and professional women.

Id. (emphasis added). Other courts have interpreted these remarks concerning the coverage of employment to refer not to the part of Senator Bayh's amendment that later became § 901(a) of Title IX, 20 U.S.C. § 1681(a), but rather to the amendment's provisions removing the exemption in Title VII for educational institutions and extending the protection of the Equal Pay Act to executive, administrative and professional positions. But Senator Bayh in his quoted remarks quite clearly referred to "faculty employment" in conjunction with the basic prohibition of his amendment and *then* referred to the "[o]ther important provisions" dealing with Title VII and the Equal Pay Act.

After making these introductory remarks, Senator Bayh in a prepared summary of his amendment divided the amendment into four parts and discussed each separately. 118 Cong. Rec. 5806-08 (1972). The first part of his summary is labeled "A. Prohibition of Sex Discrimination in Federally Funded Education Programs." Under this heading, Senator Bayh describes the

basic prohibition against sex discrimination and the enforcement provisions, noting that these sections "generally parallel the provisions of title VI." *Id.* at 5807. He also discusses the exclusions from coverage in this category It is in the second part of his discussion, labeled "B. Prohibition of Education Related Employment Discrimination," that Senator Bayh describes the amendments to Title VII and the Fair Labor Standards Act. While these headings at first blush tend to support the other courts' view, Senator Bayh's description of the *first* portion of his amendment shows that the basic prohibition of § 901 was meant to apply to employment discrimination:

> This portion of the amendment covers discrimination in all areas where abuse has been mentioned—*employment practices for faculty and administrators,* scholarship aid, admissions, access to programs within the institution such as vocational education classes, and so forth.

Id. (emphasis added).[10] This language strongly indicates that the first portion of the Act, containing § 901 and

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10 Senator Bayh made the following observations in introducing his revised amendment:

> I believe it is important to survey in some detail the scope of the problem in certain fundamental areas—hiring, scholarships, and admissions.
>
> A. Discrimination in Hiring and Promotion of Faculty and Administrators
>
> Discrimination against females on faculties and in administration is well documented and widespread abuse is clear. I have been dismayed to learn of the double standard the academic community has applied to those women who choose to make education their life work. In spite of high academic standards, a woman who has met the rigorous standards for a Ph.D. program may suddenly find that these same schools do not have sufficient confidence in their own standards to hire the graduate to teach. A recent report on Columbia University practices found that

its enforcement provisions, relates not only to discrimination against students and other beneficiaries,

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although the percentage of doctorates award to women rose from 13 to 24 percent between 1957 and 1968, the percent of women in tenured positions at the graduate facilities have remained constant—at slightly over 2 percent. Similar situations exist, according to testimony during the 1970 hearings at numbers of other schools.

Although women comprised 6.9 percent of those enrolled in law school in 1969, a survey of 36 prominent law schools during 1968-70 showed that out of a total of 1,625 faculty members, only 35 or 2.1 percent were women, and 25 percent of those 36 were classified as librarians.

. . . .

Furthermore, the rule is that once hired, women do not receive advancement as often as men. While almost half of the male teachers are given the status of full professor, only 10 percent of the women make it that far. As a result, the highest faculty ranks are weighted with men; the lowest rank with women:

Present Rank	*Men*	*Women*
Professor	24.5%	9.4%
Associate professor	21.9%	15.7%
Assistant professor	28.2%	28.7%
Instructor and below	25.3%	46.2%

Finally, those women who are promoted often do not receive equal pay for equal work. In 1965-66, at the instructor's level, the median annual salary of women was $410 less than that of male instructors; at the assistant professor's level it was $576 less; at the associate professor's level, $742 less; and at the level of full professorship, it was $1,119 less. "Fact Sheet on the Earnings Gap," U.S. Department of Labor, Women's Bureau, 1970. According to testimony submitted during the "1970 Hearings," the women at the University of Pittsburgh calculated that the University was saving $2,500,000 by paying women less than they would have paid men with the same qualifications.

Preference for men over women to fill administrative posts is just as clear. For instance, Dr. Peter Muirhead, Associate Commissioner of Education, testified during the "1970 Hearings" that more than two-thirds of the teachers in elementary and secondary schools are women, but they constitute only 22 percent of the elementary school principals and only 4 percent of the high school principals. According to a recent study by the National Education Association, only two women can be found among 13,000 school superintendents.

(footnote continued on next page)

but also to "employment practices for faculty and administrators." The *second* portion applies "title VII's widely recognized standards of equality of employment opportunity to educational institutions" and ensures that "both men and women employees receive equal pay for equal work" at such institutions. *Id.*[11]

While we are well aware of Justice Jackson's warning against selecting casual statements from floor debates, *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring), we at least get further reinforcement of the principal sponsor's views as expressed above by looking at the

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> In higher education, female administrators are virtually nonexistent. Dr. Ann Scott, from the University of Buffalo, highlighted the "progressive evaporation of women as we climb the academic ladder" by pointing out that while women are only 5 percent of the full professors at that institution, they are even less—1 percent—of the top administration "1970 Hearings." [*Sic.*] Even at women's colleges there has been a decline in recent years in the number of high administrative posts held by women. And as Dr. Bernice Sandler pointed out in a recent speech, if it were not for female presidents at Catholic colleges, the number of women college presidents would be less than the number of whooping cranes.
>
> 118 Cong. Rec. 5804-05 (1972).

11 There is some discrepancy in Senatory Bayh's breakdown of his amendment. The first part of his summary begins: "Central to my amendment are sections 1001-1005 . . . ." 118 Cong. Rec. 5807 (1972). Section 1005, however, is the section of Amendment No. 874 which contains the amendments to Title VII. Thus, an argument could be made that Senator Bayh's references to employment discrimination in this first portion actually are references to § 1005 rather than to the basic prohibition. It is clear from his discussion in the first two parts of the summary, however, that the first part was not meant to cover the Title VII provision, but only the basic prohibition, the enforcement mechanism and the exclusions. The discussion of the proposed amendment to Title VII does not come until the *second* part of the summary. Accordingly, we conclude that the mention of § 1005 of the amendment in the first part of the summary was simply an oversight.

debate on the Senate floor just prior to Senate passage of Title IX. In that debate Senator Pell, the floor manager of the entire education bill, addressed several questions to Senator Bayh concerning the scope of § 1001(a) and (b) of the Bayh Amendment, the predecessors of § 901(a) and (c) of Title IX. The following colloquy leaves little doubt that Senator Bayh intended employment practices to be covered under what is now § 901:

> MR. PELL. . . . Sections 1001(a) and (b) include all educational institutions which receive Federal assistance. This includes elementary and secondary schools as well. With regard to private undergraduate colleges, the Senator has excluded from coverage their admissions practices. Does the same exclusion apply to nonpublic institutions at the elementary and secondary level?
>
> MR. BAYH. At the elementary and secondary levels, admissions policies are not covered. As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, *and discrimination in employment within an institution, as a member of a faculty or whatever.*
>
> *In the area of employment, we permit no exceptions.* In the area of services, once a student is accepted within an institution, we permit no exceptions. The Senator from Rhode Island asked

about admissions policies of private secondary and primary schools. They would be excepted.

* * * * *

MR. PELL. . . . [D]o I understand the Senator to say that the faculty of private schools would have to reflect a sexual balance?

MR. BAYH. This amendment sets no quotas. It only guarantees equality of opportunity. The Senator from Indiana cannot be sure about the sexual balance in any faculty, but as far as employment opportunities are concerned, the answer would be "Yes."

* * * * *

MR. PELL. Would this apply to a parochial school where they have nuns *as teachers?*

MR. BAYH. No. *There is an explicit exception for education institutions controlled by a religious organization.*

* * * * *

MR. PELL. Mr. President, I refer to a preparatory school such as Peekskill Military Institute which is at the high school level. Would that school be expected to have *women teachers?*

* * * * *

MR. BAYH. *All military schools are excluded.*

118 Cong. Rec. 5812-13 (1972) (emphasis added).

It is clear from these questions and answers not only that Senator Bayh intended employment to be covered by § 901, but also that the exemptions for religious and military institutions now contained in § 901(a)(3) and

(4) apply to *employment* as well as to admissions and services. Obviously Senator Bayh's responses to Senator Pell that the employment practices of religious and military schools were covered by the exclusions in § 901(a) would make no sense if employment practices were not included within the scope of § 901(a) to begin with. Despite Justice Jackson's warning, such statements by the sponsor of a piece of legislation are at the very least helpful and may indeed be authoritative. *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760,* 377 U.S. 58, 67-68 (1964); *Schwegmann Brothers, supra,* 341 U.S. at 394-95.

We also note that one month after the Higher Education Amendments of 1972 containing Title IX were signed into law by the President, Senator Bayh published in the Congressional Record a summary of the requirements of Title IX prepared by Dr. Bernice Sandler of the Association of American Colleges. That summary's description of the basic prohibition of § 901(a) included a footnote which noted the following differences between Title IX and Title VI:

> Apart from admission coverage . . ., the Higher Education Act differs from Title VI in that the sex discrimination prohibition is limited to federally assisted *education* programs and activities, whereas the race, color and national origin discrimination prohibitions are applicable to *all* federally assisted programs. Title VI also specifically excludes *employment* from coverage (except where the primary objective of the federal aid is to provide employment). There is no similar exemption for employment in the sex discrimination provisions relating to federally assisted education programs.

118 Cong. Rec. 24684 n.1 (1972) (emphasis in original). Thus, after the Act's passage, the primary sponsor of Title IX adopted a summary of that title which expressly noted the distinction between Titles VI and IX in terms of employment coverage.

Turning to the House of Representatives, the House version of the amendments to the Higher Education Act of 1965 was simultaneously being considered as H.R. 7248. A provision on sex discrimination in educational institutions, similar to that introduced by Senator Bayh, was included in the bill reported by the House Committee on Education and Labor. *See* H.R. Rep. No. 554, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2462, 2511-12, 2566-67. The principal difference was the inclusion of § 1004 in the House bill, paralleling the language of § 604 of Title VI, which we have discussed above. The House Committee report states:

> *Section 1004* provides that nothing in this title may be taken to authorize action by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Id. at 2566 (emphasis in original). The Committee's bill was passed by the House on November 4, 1971 without any change in the provisions of § 1004 of the bill. 117 Cong. Rec. 39353-54 (1971). There was no specific discussion of § 1004 during the House debate. 117 Cong. Rec. 39248 *et seq.* (1971). As we have pointed out, this provision in the House bill went to the

conference committee, and the House receded. *See* note 8 *supra*.

It is not enough, we think, to say as the court below and the other circuits have suggested that the deletion of this provision in conference was simply to avoid inconsistency with the other provisions of the bill proposing to amend Title VII and the Fair Labor Standards Act, since Congress could easily have drafted an employment exclusion applicable solely to the first portion of the Act. For example, Congress could readily have said: "Nothing in § 901 shall apply to any employees of any educational institution subject to this title except where a primary objective of the Federal financial assistance is to provide employment." In light of the ease with which an appropriate employment exclusion could have been substituted, and in light of the Senate sponsor's view of his amendment as expressed in his summary and in the debates from which we have quoted above, we cannot agree that the omission was simply correction of a "drafting mistake." Rather, the deletion of the House provision supports HEW's broader interpretation of the Act. Appellees point us to no language anywhere in the legislative history that even suggests that the conference committee deleted the provision merely for reasons of consistency, and we have not been able to find any. In short, this was *not*, in our view, a matter of simply correcting legislative inadvertence.

It is not without significance that Congress itself undertook a statutorily mandated review of the Title IX regulations which are here challenged. That review procedure provided at the time that any regulation would become effective not less than 45 days after transmission "unless the Congress shall, by concurrent

resolution, find that the standard, rule, regulation or requirement is inconsistent with the Act from which it derives its authority, and disapprove such standard, rule, regulation or requirement." 20 U.S.C. § 1232(d)(1) (Supp. IV 1974). Senator Helms introduced such a concurrent resolution to disapprove all of the HEW regulations issued under Title IX including Subpart E. S. Con. Res. 46, 94th Cong., 1st Sess., 121 Cong. Rec. 17301 (1975). The resolution was referred to the Senate Committee on Labor and Public Welfare, which took no action on it. In the House, Representatives Quie and Erlenborn introduced an amendment to a concurrent resolution which amendment specifically sought to disapprove the employment sections of the regulations. Their amendment stated: "Subpart E . . . is inconsistent with the Act since by amendment to Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act of 1938, Congress has conferred such jurisdiction upon the United States Equal Employment Opportunity Commission and the Department of Labor." Unpublished Amendment to H.R. Con. Res. 330, Hearings Before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess. (1975) on file with that Committee. In testimony before the House Education and Labor Committee's Subcommittee on Postsecondary Education, Senator Bayh expressed support for the HEW regulations, stating that HEW's "[T]itle IX guidelines, as the Congress mandated, call for equality in admissions, financial aid, course offerings, career counseling, *and in the case of teachers and other educational personnel, employment, pay and promotions*." Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education of the

House Committee on Education and Labor, 94th Cong., 1st Sess. 173 (1975) (emphasis added). The concurrent resolution and amendment were never passed out of the Education and Labor Committee. Thus, no concurrent resolution was passed by either House, and HEW's regulations took effect.

Subsequent attempts to limit the scope of § 901 have also failed. Later in 1975, Senator Helms introduced a bill, S. 2146, proposing to amend § 901 along the lines that we have suggested could have been used by Congress in the first instance if Congress intended to exclude employment from coverage. His bill read in part: "Nothing in [§ 901 of Title IX] shall apply to any employees of any educational institution subject to this title." 121 Cong. Rec. 23845-47 (1975). His bill was not adopted. A year later, Senator McClure offered another amendment to limit the coverage of § 901 to the "curriculum or graduation requirements of the institutions" receiving federal aid. 122 Cong. Rec. 28136 (1976). Senator Bayh made the following remarks in opposition to the amendment:

> The impact of this amendment is enormous—it would exempt those areas of traditional discrimination against women that [were] the reason for the congressional enactment of Title IX. These areas would include scholarship aid, *employment and employment benefits* and extracurriculum activities such as athletics.

Id. at 28144 (emphasis added). Senator McClure's amendment was not adopted. *Id.* at 28147.

While Congress *later* amended the statute requiring congressional review of such regulations to provide that the failure to adopt a concurrent resolution disapprov-

ing a final regulation should not be construed as approval of the regulation or as a finding of consistency with the authorizing statute, 20 U.S.C. § 1232(d)(1), we think the failure of Congress here to adopt resolutions, *along with bills and amendments*, specifically designed to exempt employment from HEW regulation after hearing arguments on both sides provides some evidence that coverage was intended. *See Cannon v. University of Chicago, supra*, 441 U.S. at 703; *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14-16 (1941). Moreover, Congress has twice amended the coverage of Title IX when it has disagreed with HEW's interpretation of the statute. 20 U.S.C. § 1681(a)(8), (9). *See NLRB v. Bell Aerospace Co., supra*, 416 U.S. at 275; *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 313-14 (1933). We recognize that this review of subsequent congressional action with respect to the regulations is not conclusive, and we agree with the First Circuit that "Congressional inaction should not be lightly construed as approval," *Islesboro School Committee v. Califano, supra*, 593 F.2d at 428 n.3. Nonetheless, we think the congressional reaction to the Title IX regulations, in the context of the legislative history as a whole, lends some additional weight to the view that § 901 was expressly intended to relate to employment practices.

Nor is it particularly noteworthy that employment discrimination in educational institutions is now prohibited by Title VII and the Equal Pay Act. Overlapping jurisdiction in the area of employment discrimination is well recognized. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974). We visualize Congress as in effect saying

that individual employees may exercise their rights under either Title VII or the Equal Pay Act, but that HEW may use its powers to threaten to withdraw federal funds or actually withdraw them if necessary when a recipient of federal financial assistance practices discrimination on the basis of sex.[12]

We recognize the argument that purports to speak both to the heart and to "common sense,"—*i.e.*, that Congress could hardly have intended to penalize the students who are primary beneficiaries of a federally funded program simply because there is discrimination against teachers or staff. While this argument may have some initial appeal, we believe it to be superficial. HEW unquestionably has the authority to withhold funds when it finds that any *student* or group of *students* has been discriminated against in any educational program even when the vast majority of students in such a program have suffered no discrimination and would be hurt by the loss of funds. It is perfectly consistent, in our view, to find that Congress has given HEW the same authority to oversee sex discrimination in educational *employment* in light of the grave congressional concern over sex discrimination in that area. *See* note 10 *supra*. As we have indicated, our reading of the statutory scheme leads us to conclude that Congress intended HEW to have available the potent remedy of fund withdrawal to ensure compliance with the prohibition against sex discrimina-

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12 We note that HEW included in Subpart E an exemption, similar to that contained in § 703(e) of Title VII, 42 U.S.C. § 2000e-2(e), for those situations where sex discrimination can be justified as a "bona fide occupational qualification" (BFOQ). 45 C.F.R. § 86.61 (now 34 C.F.R. § 106.61 (May 9, 1980)). This eliminated the possible inconsistency that HEW could withdraw funds under Title IX for sex discrimination that is expressly authorized under the BFOQ exception of Title VII.

tion in employment rather than rely solely on the important, but usually piecemeal, sanctions available to aggrieved employees under Title VII and the Equal Pay Act.

Finally, while § 902 of Title IX requires that an order terminating federal financial assistance be "limited in its effect to the particular program or part thereof, in which . . . noncompliance has been . . . found," we disagree with the court below and the district court in *Romeo Community Schools, supra*, 438 F. Supp. at 1033, that this limitation "is implicitly a limitation on HEW's authority to regulate as well." Such a construction is contrary to the judicial approval given to broad HEW guidelines under Title VI of the Civil Rights Act of 1964, which also contains this language limiting fund termination. *See United States v. Jefferson County Board of Education*, 372 F.2d 836, 847-61 (5th Cir. 1966), *adopted en banc per curiam*, 380 F.2d 385, *cert. denied*, 389 U.S. 840 (1967). Moreover, employment discrimination is no less "program specific" than other practices recognized as subject to the provisions of Title VI and Title IX. For instance, discrimination in admissions to an institution's graduate schools is clearly prohibited by Title IX regardless of whether the discrimination occurs solely in one graduate program or all graduate programs. By the same token, employment discrimination might occur in one program or in more than one program. Nothing in § 902 requires HEW only to issue regulations directed at specific programs. Rather, we think the statute merely requires that any termination of funds be limited to the particular program or programs in which noncompliance with § 901 is found and does not require HEW to specify prior to termination which particular programs receiving financial assistance are covered by its regulations.

In order to terminate federal assistance to a particular program under Title IX, HEW is required to show that there has been sex discrimination in that program. And if discrimination occurs throughout an entire educational system, that system can be considered one "program" under Title IX or Title VI for purposes of terminating funds. *See Jefferson County, supra*. But the question of the scope of HEW's authority to terminate funds is different from the question whether HEW is authorized by § 901 of Title IX to issue broad regulations prohibiting sex discrimination in employment. The latter question we answer in the affirmative, and hence do not reach the question whether HEW has authority to issue regulations which prohibit sex discrimination in employment to the extent that it constitutes discrimination against students—the so-called question of "infection." [13]

Because of its holding that HEW had no authority to issue employment regulations under Title IX, the district court did not take any evidence on the questions whether North Haven or Trumbull engaged in any discrimination on the basis of sex or whether, if so, any fund termination had to be limited to a particular program or particular programs. In reversing the summary judgments granted by the district court in favor of the school boards, we express no view as to whether the HEW regulations were actually violated or what remedies, if any, might be appropriate. We merely hold that HEW has authority under Title IX to promulgate the employment discrimination regulations at issue here.

We accordingly reverse the judgment below and remand the cause for further proceedings.

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13 *See* note 6 *supra* and accompanying text.

APPENDIX C

UNITED STATES COURT OF APPEALS

Second Circuit

Nos. 79-6136, 79-6247, 79-7747

OCTOBER 24, 1980

NORTH HAVEN BOARD OF EDUCATION,

Plaintiff-Appellee,

v.

SHIRLEY M. HUFSTEDLER, et al.,

Defendants-Appellants.

TRUMBULL BOARD OF EDUCATION,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF EDUCATION and LINDA POTZ,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellees, The North Haven Board of Education and The Trumbull Board of Education,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/s
A. Daniel Fusaro
Clerk

APPENDIX D-1

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NORTH HAVEN BOARD OF EDUCATION	)	CIVIL
	)	ACTION
v.	)	
	)	NO.
CALIFANO	)	N-78-165

MEMORANDUM OF DECISION

NORTH HAVEN BOARD OF EDUCATION v. CALIFANO, Secretary of Health, Education and Welfare, et al., No. N-78-165, April 24, 1979, as amended April 26, 1979

BURNS, District Judge: -

Plaintiff school board seeks declaratory and injunctive relief against the defendants for threatened termination of federal aid. Before the court at this time are defendants' motion to dismiss or, in the alternative, for summary judgment and plaintiff's cross motion for summary judgment. In light of the unusual unanimity among the federal judiciary with regard

to the issue at hand, defendants' motion for summary judgment is denied and plaintiff's cross motion for summary judgment is granted.

The facts alleged by plaintiff are as follows: Plaintiff North Haven Board of Education (hereinafter Board) is a duly elected municipal body of the Town of North Haven and of the State of Connecticut, charged with the responsibility of operating all public schools within the town. Defendant Califano is the Secretary of the United States Department of Health, Education and Welfare (hereinafter HEW). Defendant John G. Bynoe, Director of the Office for Civil Rights, Region I of HEW, sent a letter, dated January 10, 1978, to plaintiff stating that a complaint had been filed against the board for alleged discrimination with

respect to hiring and child care leave.[1] On three occasions in February, March, and April, 1978, plaintiff asked the defendants either to dismiss the complaint for lack of jurisdiction or to hold it in abeyance pending court resolution of the underlying complaint. Letters dated April 19, 1978 and April 27, 1978 sent from defendants to plaintiff both stated the board's failure to provide certain information indicated the

[1] The complainant, Elaine Dove, alleged that after receiving tenure as a teacher of special education with the plaintiff North Haven Board of Education, she left her position following the birth of her second child. One year later, she applied for a position similar to the one she previously had held; when the job was given to another applicant, Dove complained of discrimination on the basis of her parental status and leave for pregnancy. A lawsuit has been filed in this court. Dove v. North Haven Board of Education, Civil No. B77-501 (D. Conn., filed Dec. 23, 1977).

possibility of administrative enforcement. Federal financial aid from HEW to plaintiff for the academic years 1975-76, 1976-77, and 1977-78 was $95,269, $86,905, and $111,212, respectively. Plaintiff alleges that the administrative regulations under which HEW proceeded are invalid, void, and of no effect whatsoever.

This suit arises under the Education Amendments of 1972 (hereinafter Title IX), codified at 20 U.S.C. §§ 1681-1686. 20 U.S.C. § 1681 provides in pertinent part:

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . .

Several exceptions, not relevant here, are permitted.[2] 20 U.S.C. § 1681 gives

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[2]Briefly, the following are exempted from 20 U.S.C. § 1681: admissions to educational institutions other than vocational education, professional education, graduate higher education, and public undergraduate higher education (subsection (a)(1)); admission to educational institutions in the process of changing from a single-sex to a co-educational admissions policy (subsection (a)(2)); religious schools if the application of Title IX would be contrary to the organization's religious tenets (subsection (a)(3)); military academies (subsection (a)(4)); admissions to public institutions of undergraduate higher education which traditionally have admitted members of only one sex (subsection (a)(5)); membership in social fraternities and sororities (subsection (a)(6)(A)); membership in voluntary service organizations which traditionally have been limited to members of one sex, such as the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, and Camp Fire Girls (subsection (a)(6)(B)); conferences (and promotions and selections therefor) such as Boys State, Girls State, Boys Nation, and Girls Nation (subsection (a)(7)); father-son and mother-daughter activities at educational institutions

statutory authority to HEW to promulgate "rules, regulations, or orders of general applicability" to achieve the objectives of Title IX. In accordance with this authority, HEW issued regulations entitled "Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance," effective July 21, 1975. These regulations are found at 45 C.F.R. §§ 86.1 to 86.71. At issue in this case is Subpart E, entitled "Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited," 45 C.F.R. §§ 86.51 to 86.61, especially

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(subsection (a)(8)); and scholarship awards in "beauty" pagenats [sic] (subsection (a)(9)).

45 C.F.R. § 86.57, dealing with marital or parental status.[3]

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[3] 45 C.F.R. § 86.57 reads in full:

(a) General. A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) Pregnancy. A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) Pregnancy as a temporary disability. A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes,

The validity of Subpart E has been before the federal judiciary on eight different occasions, and in each case, the promulgation of these regulations was held to be beyond the statutory

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including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) Pregnancy leave. In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

authority of HEW because the purpose of Title IX is the prohibition of sex discrimination against students and other direct beneficiaries of federal educational assistance funds and therefore Title IX does not cover the employment practices of educational institutions which receive these funds. Isleboro School Committee v. Califano, No. 78-1302, 593 F.2d 424, 19 FEP Cases 172 (1st Cir. Mar. 9, 1979), aff'g sub nom. Brunswick School Board v. Califano, 449 F. Supp. 866, 17 FEP Cases 475 (D. Me. 1978); Auburn School District v. HEW, Civil No. 78-154, 19 FEP Cases 1504 (D.N.H. Mar. 29, 1979); Board of Education of the Bowling Green City District v. HEW, No. C 78-177, 19 FEP Cases 457 (N.D. Ohio Mar. 14, 1979); University of Toledo v. HEW, No. C 77-235, 464 F. Supp.

693, 19 FEP Cases 108 (N.D. Ohio Jan. 31, 1979); Junior College District of St. Louis v. Califano, 455 F. Supp. 1212, 18 FEP Cases 88 (E.D. Mo. 1978); Dougherty County School System v. Califano, No. 78-30-ALB, 19 FEP Cases 688 (M.D. Ga. Aug. 22, 1978); Seattle University v. HEW, No. C 77-631S, 16 FEP Cases 719 (W.D. Wash. Jan. 3, 1978), appeal docketed, No. 78-1746 (9th Cir. Apr. 6, 1978); Romeo Community Schools v. HEW, 438 F. Supp. 1021, 14 FEP Cases 1177 (E.D. Mich.), appeal pending Nos. 77-1691 & -1692 (6th Cir. May 18, 1977). Although none of these cases originated within this circuit, this court is persuaded by the reasoning of the opinions and adopts it as its own.[4]

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[4]Many of the arguments presented in these opinions were forecast in Kuhn,

The most detailed analysis of 20 U.S.C § 1681 and these regulations is found in Romeo Community Schools v. HEW, supra. The court's decision was premised upon five basic grounds. First, the court took a broad view of the entire Title IX legislative package. Comparisons were made between Title VI of the Civil Rights Act of 1964, codified at 42 U.S.C. §§ 2000d to 2000d-5. However, one important difference between Title VI and Title IX was observed: Title VI contains a provision explicitly excluding discrimination in employment, found in 42 U.S.C. § 2000d-3.[5] HEW attributed

"Title IX: Employment and Athletics are Outside HEW's Jurisdiction." 65 Geo. L.J. 49, 50-62 (1976).

[5] 42 U.S.C. § 2000d-3 provides in full:

Nothing contained in this subchapter shall be construed to authorize action

significance to the absence of a specific exclusion in Title IX. The district court rejected this construction, finding that

> [T]his discrepancy must be traced to the fact that Title IX was enacted as part of a larger legislative program which also included an amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., enlarging the scope of that provision to include sex discrimination in employment, as well as an amendment to the Equal Pay Act, giving the Secretary of Labor authority to regulate sex discrimination in educational employee compensation. 29 U.S.C. § 206(d). A provision similar to (42 U.S.C. § 2000d-3) was left out of this package in order to avoid the inherent contradiction between such a provision and these amendments.

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under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

438 F. Supp. at 1030, 14 FEP Cases at 1184 (footnote omitted) (emphasis in original). Second, the court focused solely upon the statutory language of 20 U.S.C. § 1681 and held that the section addressed itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs:

> Section 1681 must therefore be read to protect from sex discrimination only those persons for whom the federally assisted education programs are established, and this can only mean the school children in those programs. As a reference to faculty employees, the language of § 1681 is indirect, if not obscure. Teachers participate in these programs only to the extent that they may teach and help administer some of them; teachers benefit from these programs only to the extent that the funds for them may be used to pay their salaries: teachers are "subjected to discrimination <u>under</u>" these programs, (emphasis added), only

> to the extent that the programs themselves may be established and operated in an employment-related discriminatory way. Teachers, in short, are hard pressed to fit themselves within the plain meaning of § 1681's prohibitory language, general as it may appear on its face.

Id. at 1031-32, 14 FEP Cases at 1185. A third factor was that the express exclusions in subsection 1681(a) relate solely to student activity or enrollment.[6]

The fourth and fifth grounds concentrated upon the enforcement mechanism of Title IX, 20 U.S.C. § 1682 provides in pertinent part:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom

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[6] See note 2 supra.

> there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

Termination of federal funds is the only sanction authorized. As the court observed, the termination of a school program penalizes the students, but Congress apparently had engaged in a cost-benefit analysis to determine that any benefit

that students might derive from the education programs funded by HEW was more than outweighed by the sex discrimination in those programs. Id. at 1032. However, the termination weapon would be ineffective against sex discrimination in employment, having no enforcement value: "The court doubts that Congress would resort to such an arbitrary enforcement measure where alternative methods of prohibiting employment discrimination, more effective and less costly than this, are readily available." Id. at 1032-33. The second aspect of § 1682 is that the termination is "limited in its effect to the particular program, or part thereof, in which such non-compliance has been found." This "program specificity" rule requires HEW to make a program-by-program analysis. As the court found,

> Regulation of employment practices, however, is inherently non-"program specific." An educational institution's employment policies are general in nature, covering, by and large, all faculty employees involved in all of an institution's education programs, whether federally funded or not . . . . Compliance with HEW's regulations under Subpart E will inevitably require modifications of employment policies which apply generally to all faculty employees and education programs throughout the system. Yet the federal interest involved here, as defined by the scope of §§ 1681 and 1682, is much narrower and does not appear to justify this kind of regulatory leverage.

Id. at 1033, 14 FEP Cases at 1186-87. Thus the court concluded that Subpart E was "patently overbroad." Id.

The Romeo decision has been extended to HEW's capacity to investigate alleged sex discrimination in Board of Education of the Bowling Green City District v. HEW, supra, and University of

Toledo v. HEW, supra. In these nearly identical opinions, Judge Walinski ruled that HEW lacks the authority to investigate the employment practices of the plaintiff in order to determine an educational institution's overall compliance with Title IX. In the absence of jurisdiction to regulate employment practices, HEW similarly had no jurisdiction to investigate such practices. Slip ops. at 4-5.

Defendants' reliance upon Piasick v. Cleveland Museum of Art, 426 F. Supp. 779, 14 FEP Cases 33 (N.D. Ohio 1976) and United States v. City of Chicago, 395 F. Supp. 329, 16 FEP Cases 1279 (N.D. Ill.), aff'd mem. 525 F.2d 695 (7th Cir. 1975), is misplaced. The First Circuit effectively disposed of these cases in Islesboro School Committee v.

Califano, supra. The Islesboro opinion correctly observed that whatever comments were made in Piascik were dicta at best. Slip op. at 9-10, construing 426 F. Supp. at 780-81 n.1. The Chicago case was inapposite as it concerned financial aid granted under the federal revenue sharing programs, which "embod[y] an entirely different legislative scheme from the Education Act and its Amendments." Slip. op. at 10-11.

Lastly, defendants invoke what is called the "infection theory," having its genesis in United States v. Jefferson County Board of Education, 372 F.2d 836, 884-86 (5th Cir. 1977), aff'd en banc, 380 F.2d 385 (5th Cir.), cert. denied sub nom. Board of Education of City of Bessemer v. United States, 389 U.S. 840 (1967) and in Board of Public Instruction

of Taylor County, Florida v. Finch, 414 F.2d 1068, 1078 (5th Cir. 1969). In these Title VI cases, the courts stated that HEW administrative action may be warranted if it has been demonstrated that the elimination of discrimination against students in [sic] impossible without also eliminating discrimination against faculty. However, the court in Romeo explicitly rejected the "infection theory" in a Title IX context: "Whatever its validity or significance, however, the possibility of such a discriminatory infection does not authorize HEW to regulate employment practices for their own sake, and that quite clearly is what HEW purports to do through Subpart E of its Title IX regulations." 438 F. Supp. at 1035. The Isleboro court agreed, adding that there must be a clear nexus

between the sexual discrimination against employees and its effect upon students. Slip op. at 11.

Accordingly, it is

ORDERED that defendants' motion to dismiss or, in the alternative, for summary judgment, is denied.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is granted.

IT IS FURTHER ORDERED that the regulations set forth in 45 C.F.R. §§ 86.51 to 86.61, inclusive, are declared invalid, void, and of no effect whatsoever.

IT IS FURTHER ORDERED that defendants, their agents, employees, and persons acting in concert or participation with them are permanently enjoined from terminating or refusing to grant,

or attempting to terminate or refuse to grant, federal financial assistance to plaintiff for any alleged noncompliance with said regulations.

SO ORDERED

APPENDIX D-2

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NORTH HAVEN BOARD OF EDUCATION	)	
	)	CIVIL
v.	)	
	)	NO.
JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL	)	N-78-165

AMENDMENT TO MEMORANDUM OF DECISON

The court's memorandum of decision, filed April 24, 1979, is amended so that footnote 2 shall read as follows:

2/ Briefly, the following are exempted from 20 U.S.C. § 1681: admissions to educational institutions other than vocational education, professional education, graduate higher education, and public undergraduate higher education (subsection (a)(1)); admission to educational institutions in the process of changing from a single-sex to a co-educational admissions policy (subsection

(a)(2)); religious schools if the application of Title IX would be contrary to the organization's religious tenets (subsection (a)(3)); military academies (subsection (a)(4)); admissions to public institutions of undergraduate higher education which traditionally have admitted members of only one sex (subsection (a)(5)); membership in social fraternities and sororities (subsection (a)(6)(A)); membership in voluntary service organizations which traditionally have been limited to members of one sex, such as the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, and Camp Fire Girls (subsection (a)(6)(B)); conferences (and promotions and selections therefor) such as Boys State, Girls State, Boys Nation, and Girls Nation (subsection

(a)(7)); father-son, and mother-daughter activities at educational institutions (subsection (a)(8)); and scholarship awards in "beauty" pageants (subsection (a)(9)).

SO ORDERED

/s/
ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this 26th day of April, 1979.

APPENDIX E-1

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

THE TRUMBULL BOARD OF EDUCATION	)	
	)	CIVIL
v.	)	ACTION
	)	
UNITED STATES DEPARTMENT OF HEALTH, EDUCATION & WELFARE and LINDA POTZ	)	NO.
	)	B-78-401

MEMORANDUM OF DECISION

For the same reasons set forth in this court's ruling in North Haven Board of Education v. Califano, Civil No. N-78-165 (D. Conn. Apr. 24, 1979), plaintiff's motion for summary judgment is granted.

SO ORDERED

/s/
ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this 24th day of May, 1979.

APPENDIX E-2

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

THE TRUMBULL BOARD OF EDUCATION	)	
	)	CIVIL
v.	)	ACTION
	)	
UNITED STATES DEPARTMENT OF HEALTH, EDUCATION & WELFARE and LINDA POTZ	)	NO.
	)	
	)	B-78-401

MEMORANDUM OF LAW DENYING MOTION OF DEFENDANT POTZ TO SET ASIDE ORDER OF SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF, GRANTING PLAINTIFF'S MOTION TO AMEND JUDGMENT, AND DENYING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant Linda Potz was a guidance counselor for the plaintiff Trumbull Board of Education. Upon a complaint of sex discrimination filed with the United States Department of Health, Education & Welfare (hereinafter HEW) by Potz, HEW conducted an investigation of plaintiff's employment practices after which it found the plaintiff

board guilty of violating certain provisions of Title IX of the Education Amendments of 1972 (hereinafter Title IX), codified at 20 U.S.C. §§ 1681-1686, specifically in job assignments, working conditions, and non-renewal of Potz's contract. HEW thereafter threatened to terminate plaintiff's federal aid if certain assurances toward compliance were not made. Plaintiff brought this suit, alleging that certain HEW regulations, 45 C.F.R. §§ 86.51 to 86.61, entitled "Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited," exceeded HEW's rule-making authority pursuant to 20 U.S.C. § 1681. This court granted plaintiff's motion for summary judgment on May 24, 1979, based upon its prior decision in North Haven Board of Education v.

Califano, Civil No. N78-165 (D. Conn. Apr. 24, 1979), which invalidated the same regulations in question here. Defendant Potz has moved to set aside the prior ruling in light of the United States Supreme Court decision in Cannon v. University of Chicago, 47 U.S.L.W. 4549 (U.S. May 16, 1979). Defendant Potz's motion is denied, for the court finds that the Cannon opinion has no significant ramifications upon the result reached here and in the North Haven case.

20 U.S.C. § 1681(a) provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits or, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . .

(Emphasis added). Despite this broad language, every federal court which has

confronted directly the validity of 45 C.F.R. §§ 86.51 to 86.61 has held that these regulations exceed HEW's statutory authority because Title IX's purpose is to prohibit sex discrimination against students and other direct beneficiaries of federal educational assistance funds and not against employees of educational institutions which receive federal funds. Romeo Community Schools v. HEW, 48 U.S.L.W. 2021 (6th Cir. June 20, 1979), aff'g 438 F. Supp. 1021 (E.D. Mich 1977); Junior College District of St. Louis v. Califano, 47 U.S.L.W. 2700 (8th Cir. Apr. 19, 1979), aff'g 455 F. Supp. 1212 (E.D. Mo. 1978); Isleboro School Committee v. Califano, 593 F.2d 424 (1st Cir. 1979), aff'g sub nom. Brunswick School Board v. Califano, 449 F. Supp. 866 (D. Mo. 1978); North Haven Board of Education v.

Califano, Civil No. N78-165 (D. Conn. Apr. 24, 1979), Auburn School District v. HEW, Civil No. 78-154 (D.N.H. Mar. 29, 1979); Board of Education of the Bowling Green City District v. HEW, No. C 78-177 (N.D. Ohio Mar. 14, 1979); University of Toledo v. HEW, 464 F. Supp. 693 (N.D. Ohio 1979); Dougherty County School System v. Califano, No. 78-30-ALB (M.D. Ga. Aug. 22, 1978); Seattle University v. HEW, No. C 77-6315 (W.D. Wash. Jan. 3, 1978), appeal docketed, No. 78-1746 (9th Cir. Apr. 6, 1978). See Siegel, Circuits Exclude Teachers From Coverage for Bias Under Title IX, Nat'l L.J., May 28, 1979, at 22, col. 1.

Defendant Potz argues that the Cannon opinion mandates a broad construction of 20 U.S.C. § 1681(a). Petitioner Cannon complained that she had been

denied admission to respondent's medical school because she was a woman. Both the district and circuit courts had dismissed Cannon's complaint on the grounds that there was no implied private right of action under Title IX, in the absence of explicit statutory authorization. The Supreme Court reversed, relying upon the four-prong test developed in Cort v. Ash, 422 U.S. 66 (1975). The Court analogized Title IX to Title VI of the Civil Rights Act of 1964, codified at 42 U.S.C. §§ 2000d to 2000d-5, under which the court previously had found a private right of action. The Court urged that Title IX and Title VI be given similar statutory construction:

> The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.

. . .

> . . . In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.

47 U.S.L.W. at 4553-54.

Despite the statutory similarity between Title IX and Title VI, there is one significant difference -- Title VI contains an explicit exclusion exempting discrimination in employment:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. § 2000d-3. This distinction was not at issue in Cannon, where the

alleged discrimination concerned admissions policy, not employment. Defendant Potz argues that the absence of such an exclusionary provision means that Congress deliberately meant to include employment issues within Title IX's ambit. This same argument, advanced by HEW in prior rulings, was rejected by the 6th Circuit in Romeo Community Schools v. HEW, 48 U.S.L.W. 2021 (6th Cir. June 20, 1979), aff'g 438 F. Supp. 1021 (E.D. Mich. 1977):

> . . . Title IX does not stand alone. It is part of a mosaic of federal statutes which protect the rights of women and minorities. Two of the pre-existing federal laws which prohibited discrimination in employment were amended by § 906 of Pub. L. 92-318, the same statute which contained the operative and enforcement provisions of Title IX (§§ 1681 and 1682). These amendments to the Equal Employment Opportunities Act, Title VII of the 1964

> Civil Rights Act, 42 U.S.C. § 2000e, and the Equal Pay Act, 29 U.S.C. § 213(a), brought employees of educational institutions engaged in educational activities within their coverage and prohibited discrimination on the basis of sex. The inclusion of these amendments to existing laws which closed loopholes relating to employment practices required that Pub. L. 92-318, for consistency, not contain a disclaimer similar to that contained in Title VI. The elimination of this language does not indicate that Title IX was intended to cover employment practices. Rather it reflects the fact that at that point in the legislative process such a provision in Pub. L. 92-318 would have been inaccurate and contradictory in light of this statute's extension of existing laws to cover employment practices of educational institutions.

Slip op. at 5-6 (footnote omitted). It is interesting to note that the appellate decision in Romeo was issued more than a month after the Cannon opinion.

Defendant Potz also quotes at length from Senator Bayh, whose statements do mention employment discrimination. 118 Cong. Rec. 5803, 5807 (1972). The 6th Circuit was not influenced by these quotations for it found that the statements referred to § 906 of the bill then under consideration, which section consisted of the amendments to the Civil Rights Act of 1964 and the Equal Pay Act. Romeo, Slip op. at 6-7. Moreover, even were Senator Bayh's statements applicable, other excerpts from Title IX's legislative history would suggest that Title IX's focus was upon students and other direct beneficiaries. For example, Representative Mink stated:

> Any college or university which has (a) policy which discriminates against women applicants . . . is free to do so under

> (Title IX) but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access.

117 Cong. Rec. 39252, quoted in 47 U.S.L.W. 4556 n.36.

Defendant Potz also stresses that Piascik v. Cleveland Museum of Art, 426 F. Supp. 779 (N.D. Ohio 1976), was cited wth approval in Cannon. 47 U.S.L.W. 4556 n.40. However, the relevant material in Piascik (426 F. Supp. at 780-81 n.1) was dicta at best. Isleboro School Committee v. Califano, 593 F.2d at 429.

The only aspect of the district court opinion in Romeo which may have been modified by Cannon is the district court's discussion of 20 U.S.C. § 1682 as

the enforcement mechanism of Title IX. 438 F. Supp. at 1032-33. The Cannon opinion makes clear that the termination of federal financial support for educational institutions is not the only remedy available under Title IX.[1] However, this is but one element of the

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[1] The 6th Circuit's position on this issue, in the wake of Cannon, is unclear, especially because the Cannon ruling is not mentioned in the Romeo decision. The 6th Circuit appears to acknowledge a right of private action under Title IX when it refers to the discontinuance of federal financial assistance as "the means of effecting compliance which is most available to HEW but then describes it as "the primary means contemplated by the enforcement provisions contained in § 1682." Romeo, slip op. at 6. (emphasis added) The 6th Circuit then continues:

> When this sanction is applied one result is that the students who are engaged in the federally funded activities suffer. This may be a reasonable burden for the students to bear when the object is to prevent or put an end to discrimination

Romeo opinion, and the decision still rests securely on its other bases.

The court's position in this and the North Haven case is not inconsistent with Cannon, for prior to the Supreme Court opinion this court had ruled that there is a private right of action under Title IX. Price v. Yale University,

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against students. However, it is unreasonable to assume that Congress intended for students in a school system to be deprived of the benefits of federal funding as a means of enforcing individual rights of teachers and other school employees. This is particularly true in view of the fact that the same bill included the amendments which gave school employees direct and superior remedies for sex discrimination provided in Title VII of the 1964 Civil Rights Act. These remedies involve no loss of student benefits.

Id.

Civil No. N77-277 (D. Conn. Dec. 21, 1977) (Latimer, Magistrate). Together these cases stand for the proposition that a student or direct beneficiary may bring a private suit against an educational institution receiving federal funds for alleged sex discrimination but that Title IX does not extend to alleged sex discrimination in employment practices by such an institution.

Lastly, defendant Potz raises the same "infection theory" advocated by HEW in the North Haven case. While the allegedly discriminatory action by the plaintiff board presents a stronger case for adopting this theory in the instant case than under the facts of the North Haven case, the court does not find that there is a clear nexus between the sexual discrimination against employees and its

effect upon students. Isleboro, 593 F.2d at 430.

In sum, defendant Potz's motion to set aside the ruling of May 24, 1979, which granted summary judgment for the plaintiff, is denied, as the court holds that the Cannon decision does not disturb this court's earlier ruling.

Lastly, plaintiff moves to amend the judgment to include specific injunctive and declaratory relief in a form substantially similar to that entered in the North Haven case. This motion is granted, so that the concluding paragraphs of the May 24, 1979 memorandum of decision read as follows:

"Accordingly, it is

"ORDERED that plaintiff's motion for summary judgment is granted.

"IT IS FURTHER ORDERED that the regulations set forth in 45 C.F.R. §§ 86.51 to 86.61, inclusive, are declared invalid, void, and of no effect whatsoever.

"IT IS FURTHER ORDERED that defendants, their agents, employees, and persons acting in concert or participation with them are permanently enjoined from terminating or refusing to grant, or attempting to terminate or refuse to grant, federal financial assistance to plaintiff for any alleged noncompliance with said regulations."

In light of this ruling, the court denies defendant Potz's cross-motion for summary judgment, which was not yet briefed by plaintiff, pursuant to an agreement with this court.

SO ORDERED

/s/
ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut,

this ____ day of September, 1979.